requirement.[94] As a result, MCI WorldCom points out, ISR could be approved on routes where there is a dominant carrier whose market power is not constrained by competitive pressures.[95] We are concerned that lifting the ISP on such routes would enable a foreign carrier with market power to exercise its market power to evade our benchmark settlement rates or to engage in one-way bypass that would raise the effective rate paid by U.S. carriers to terminate traffic in the foreign market.[96] On the other hand, it is likely that on routes where rates to terminate traffic are significantly below benchmark levels, competitive forces exist which can constrain the market power of the dominant foreign carrier. These competitive forces may be from within the foreign market or from without, such as may exist when neighboring markets have low rates for terminating international traffic. The existence of competitive forces to restrain the market power of a dominant carrier substantially reduces our concern about the exercise of foreign market power and one-way bypass. We thus conclude that removing the ISP where rates to terminate traffic are significantly below benchmark levels is a preferable standard to removing the ISP on all routes where the Commission allows ISR.

54. We find that removing the ISP has significant merit even on those routes where we already allow ISR. Where we allow ISR, U.S. facilities-based carriers have the option of negotiating either a traditional settlement arrangement with a foreign carrier under the ISP or an ISR arrangement. Where carriers enter into an ISR arrangement, the arrangement is not bound by the requirements of the ISP. On some routes, U.S. carriers are reluctant to enter into ISR arrangements. One reason for this reluctance may be that under an ISR arrangement, U.S. carriers would not be entitled to allocation of return traffic under the proportionate return regime. As discussed above, we find that proportionate allocation of return traffic can have a detrimental effect on competition where the market power of the foreign carrier is limited by market forces.[97] We find that removing the option of relying on the ISP will foster greater competition among U.S. international carriers by reducing their ability to engage in collusive negotiations with foreign carriers in competitive markets. In addition, on some routes where we allow ISR, foreign carriers are reluctant to enter into ISR arrangements. By removing the ISP, U.S. carriers may have greater leverage in negotiating non-traditional settlement arrangements with the foreign carrier.

55. We agree with MCI WorldCom that a reasonable threshold for concluding that the ability of a dominant carrier to exercise its foreign market power is constrained by the existence of market forces is where rates to terminate traffic in the foreign market are at least 25 percent below the benchmark level. In addition, this standard provides certainty for parties seeking to interpret our rules. This standard is also straightforward and easy for the Commission to administer. Rates at this level are sufficiently below the benchmark level to indicate that a dominant carrier is facing competitive pressures to lower rates. Unless a dominant carrier were subject to competitive pressures, either from within its own market or from without, it would have little incentive to reduce its rates substantially below the benchmark levels.[98] At the same time, the 25 percent threshold is not so low as to retain the ISP in markets where the dominant carrier is subject to competitive pressures from both within and

[94] The Commission stated in the *Benchmarks Order* that it would ensure that U.S. carriers satisfy the benchmark requirements. *Benchmarks Order*, 12 FCC Rcd at 19,848, ¶ 85.

[95] MCI WorldCom *ex parte* at 3.

[96] *See* AT&T comments at 8-10.

[97] *See supra* ¶¶ 25, 26.

[98] MCI WorldCom *ex parte* at 3.

without its market. For example, countries that currently qualify under this standard are Canada, the United Kingdom, Sweden, Germany, France, Hong Kong, the Netherlands, Denmark, and Norway. Each of these countries have competitive telecommunications markets, with low interconnection rates. In addition, we note that where settlement rates are below benchmark levels, but not 25 percent or more below the benchmark, carriers remain free to exchange traffic with foreign carriers pursuant to an ISR arrangement.

56. We further find that removing the ISP on routes where settlement rates are at least 25 percent below the benchmark levels will more effectively protect U.S. consumers against the harmful effects of one-way bypass than removing the ISP on all routes that meet the ISR standard.[99] As the Commission recognized in the *Benchmarks Order*, the settlement rate benchmarks are substantially above-cost.[100] As a result, a foreign carrier still has an incentive to engage in one-way bypass on routes where U.S. carriers are paying benchmark rates to terminate traffic in the foreign market.[101] This could raise the costs U.S. carriers' incur to terminate traffic on a route and, ultimately, raise the calling prices U.S. consumers pay. The extent to which U.S. consumers may be harmed by one-way bypass is directly related to the difference between the rate at which U.S. carriers can terminate traffic in the foreign market and the cost of terminating foreign traffic in the United States. Where a foreign carrier charges substantially above-cost rates to terminate U.S. traffic in the foreign market, and the foreign carrier can terminate foreign-originated traffic in the United States at low, more cost-based rates, there is a significant risk of harm due to one-way bypass. The lower the differential between the rate to terminate traffic in the foreign market and the U.S. rate, however, the lower the incentive the foreign carrier has to engage in one-way bypass. In addition, the lower this differential, the lower the potential increased cost to U.S. carriers due to the loss of return traffic. Thus, where the foreign termination rate is substantially below the benchmark rate, there is a limit on the extent to which U.S. carriers' costs of providing international service could increase as a result of one-way bypass made possible by removing the ISP. Where rates to terminate traffic are at benchmark levels, however, there is a greater risk that consumers will be harmed by one-way bypass because there remains a significant differential between the rate to terminate traffic in the foreign market and the cost of terminating traffic in the U.S. market.

57. We further find that removing the ISP where U.S. carriers are able to terminate traffic at rates that are at least 25 percent below the benchmark will provide a significant incentive for foreign carriers to lower their settlement rates below benchmark levels. As competitive pressures develop in foreign markets, foreign carriers will have an incentive to lower their rates to take advantage of increased opportunities to enter into innovative arrangements as a result of lifting the

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[99] The term "one-way bypass" traditionally refers to one-way bypass of the settlements system, whereby U.S.-inbound traffic is routed outside the ISP into the U.S. to terminate at low rates, while a foreign carrier uses its market power to require that outbound traffic be settled pursuant to a high accounting rate. We use this term more broadly here to refer to any practice by which a foreign carrier terminates U.S. inbound traffic at low rates and exercises its market power to require that U.S. carriers pay much higher rates to terminate traffic in the foreign market. *See supra* ¶ 14.

[100] *Benchmarks Order*, 12 FCC Rcd at 19,827, ¶ 44.

[101] The Commission addressed this concern in the *Benchmarks Order* by adopting a mechanism to detect one-way bypass on ISR routes. The Commission adopted a presumption that one-way bypass is occurring if the percentage of outbound traffic relative to inbound traffic increases by 10 percent or more in two successive quarterly measurement periods. *Benchmarks Order*, 12 FCC Rcd at 19,919-22, ¶¶ 248-257.

ISP.[102]

58. We remove the ISP on all routes where settlement rates are 25 percent below the benchmark settlement rate, or less, regardless of whether the foreign country is a WTO Member or a non-WTO Member country. We find that there is unlikely to be a risk of harm due to the exercise of a foreign carrier's market power from a settlement arrangement conducted outside the ISP where settlement rates are at least 25 percent below the benchmark, regardless of membership in the WTO. In both WTO and non-WTO Member countries, the existence of settlement rates that are at least 25 percent below the applicable benchmark rate, is an indication that competitive market forces exist to constrain the ability of a foreign carrier to exercise market power. For the reasons discussed above, we also find that it is unlikely that restricting this policy only to WTO members countries would encourage foreign countries to join the WTO.[103]

59. AT&T urges us to remove the ISP only where foreign carriers settle at best practices rates or where the "ability to obtain viable ISR arrangements exists."[104] Although it subsequently modified its position, MCI WorldCom argued in its initial comments that the ISP should be lifted only for arrangements with foreign carriers from markets that offer equivalent resale opportunities or where at least 50 percent of traffic is settled within 2 cents of the best practices rate.[105] Each of the parties that suggests a more stringent standard for identifying routes on which we should lift the ISP justifies its proposed standard on the need to guard against one-way bypass of the settlements process and/or whipsawing.[106] We find, however that these more restrictive standards would maintain the ISP under circumstances in which competitive pressures constrain foreign carriers' market power and in which the potential harm to consumers is slight or nonexistent. Adopting the standards proposed by these parties would thus unnecessarily limit the routes for which the ISP would be lifted.[107] We therefore decline to adopt the standards proposed by AT&T and MCI WorldCom.[108]

60. We find that the standard we adopt here will adequately address the concerns of

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[102] MCI WorldCom *ex parte* at 3.

[103] *See supra,* ¶ 37.

[104] *See, e.g.,* AT&T comments at 9-10.

[105] MCI WorldCom comments at 5-6. In a subsequently filed *ex parte*, MCI WorldCom proposed an alternative standard to "strike [the] balance" between the Commission's "goal of removing the ISP on all routes where it is no longer necessary while at the same time preventing competition distortion in the United States." MCI WorldCom *ex parte* at 2. MCI WorldCom's alternative standard is the one we adopt here, to remove the ISP on routes where rates to terminate traffic are at least 25 percent below the benchmark rates.

[106] *See, e.g.,* AT&T comments at 13-15; TRA comments at 5-8.

[107] Under AT&T's proposed standard, only 4 countries (Canada, Hong Kong, the Netherlands and Sweden) would currently qualify as having settlement rates lower than the 8 cent "best practices" rate, adopted in the *Benchmarks Order.* Under MCI WorldCom's proposed standard, only 6 countries would currently qualify as having rates that are lower than 2 cents plus the best practices rate (the four listed above plus Germany and the United Kingdom).

[108] *See* AT&T comments at 10-14; MCI WorldCom comments at 6.

parties that suggest more restrictive standards for removing the ISP. Moreover, we find that adopting a more restrictive standard would be unnecessary and could inhibit competition. We note that there are significant costs associated with maintaining the ISP on routes where it is not necessary to prevent the exercise of foreign market power that could harm U.S. consumers. Precluding U.S. carriers from negotiating arrangements with foreign carriers outside of the nondiscrimination and proportionate return requirements of the ISP will limit opportunities for small U.S. carriers that do not carry substantial volumes of outbound traffic. As discussed above, the proportionate return requirement can limit opportunities for small carriers to compete with carriers that carry substantial amounts of traffic.[109] Indeed, Cable & Wireless notes that the proportionate return requirement can act as an entry barrier for new carriers seeking to enter the market.[110] In addition, removing the nondiscriminatory settlement rate requirement may further promote competition among U.S. international carriers by creating greater uncertainty regarding U.S. carriers' costs. This uncertainty should lead to more aggressive negotiating by U.S. carriers, which may result in lower rates for terminating international traffic for U.S. carriers.[111] Such uncertainty regarding U.S. carriers' costs can also create incentives for U.S. carriers to compete more aggressively in the retail market.

61. We find that it is not necessary to require all traffic that is terminated in a foreign market to be settled at 25 percent below the applicable benchmark settlement rate, or less, in order to lift the ISP. Rather, we find that removing the ISP where at least 50 percent of U.S.-billed traffic is terminated at such rates will ensure that the ISP is maintained only where it is necessary. In the *Benchmarks Order*, we imposed a condition that limited ISR to only those routes where settlement rates for at least 50 percent of the settled, U.S. billed traffic are at or below the appropriate benchmark.[112] We found that it was not necessary to require that all traffic on a particular route be settled at benchmark rates because any carrier, or combination of carriers, that carried at least 50 percent of traffic on a particular route would likely have the capacity to handle all traffic from U.S. carriers.[113] Likewise here, we find that the ability of U.S. carriers to terminate at least 50 percent of the U.S.-billed traffic in the foreign market at rates that are 25 percent below the benchmark rate or less is convincing evidence that competitive pressures exist in the foreign market to constrain the market power of the foreign carrier. We thus find that where at least 50 percent of traffic is terminated at rates 25 percent lower than the benchmark, or less, a foreign carrier is unlikely to have the ability to exercise market power to harm U.S. consumers and that the ISP is thus unnecessary.

62. We find that it continues to be necessary to maintain a distinction between routes the Commission approves for ISR and routes on which the Commission removes the ISP. Carriers providing service to WTO Member countries where settlement rates are below the benchmark may enter into arrangements with foreign carriers in such markets outside of the ISP, even where settlement rates are not at least 25 percent below the benchmark.[114] In the *Notice*, we stated, in support of our tentative conclusion to remove the ISP on all ISR routes, that deviation from the ISP is already

[109] *See supra* ¶ 26.

[110] C&W comments at 5.

[111] *See supra* ¶¶ 24-27.

[112] *Benchmarks Order*, 12 FCC Rcd at 12,917, ¶ 243.

[113] *Benchmarks Order*, 12 FCC Rcd at 12,918, ¶ 244.

[114] For a description of ISR, see *supra*, ¶ 13.

allowed on ISR routes as long as traffic flows over private lines. Upon further consideration, we find that this point does not support removing the ISP on all ISR routes. Where the Commission approves ISR, carriers providing service on the route are subject to a safeguard, adopted in the *Benchmarks Order*, that compares on a route-specific basis, the volume of U.S. inbound and outbound minutes that are settled under the ISP.[115] As MCI WorldCom points out, if we remove the ISP completely on a particular route, this safeguard would effectively be nullified, as no traffic would be settled under the ISP. We believe, as pointed out by MCI WorldCom, that this safeguard has a "significant deterrent effect," and is useful in detecting actions by foreign carriers that could increase costs for U.S. carriers.[116] Thus, without this safeguard on routes where we remove the ISP, there is no effective deterrent to prevent foreign carriers from engaging in one-way bypass or otherwise acting to exercise their market power to the disadvantage of U.S. carriers. We thus find that removing the ISP poses a greater risk, generally, than allowing ISR on a particular route. We therefore decline to adopt our proposal to remove the ISP completely on all ISR routes and instead remove the ISP only where the settlement rate is significantly below the benchmark.

63. Some commenting parties urge the Commission to go further than the proposal in the *Notice* and to remove the ISP completely on all routes between the United States and WTO Member countries.[117] We find that these proposals would open U.S. carriers and consumers to potential abuse from foreign monopoly carriers and therefore decline to adopt them. We disagree with the contention of GTE that U.S. carriers can negotiate with alternative carriers in "most" WTO markets when faced by an attempt at whipsawing. U.S. carriers have the option of negotiating with alternative carriers in many WTO Member markets, but some markets of WTO Member countries remain closed to competition. We are aware, as GTE points out, that "services and technologies that bypass the settlements regime," such as refile, are available for carriers seeking to avoid the legal monopoly of a foreign incumbent carrier in some countries that are legally closed to competition.[118] We find it encouraging that such activity is putting pressure on settlement rates in those countries. Such methods of termination may not be a realistic alternative, however, for the termination of large amounts of traffic, particularly where termination of traffic in such a manner is illegal in the foreign country.[119] Moreover, in countries that have high settlement rates with U.S. carriers, the potential harm to U.S. consumers from one-way bypass and/or whipsawing could be significant. In cases where settlement rates are high, and the foreign market does not offer equivalent resale opportunities, the risk of harm from lifting the ISP is great, and is not outweighed by the potential procompetitive effects of lifting the ISP on such routes. We therefore find that the benefits of removing the ISP for service to all

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115 *Benchmarks Order*, 12 FCC Rcd at 19,919-20, ¶¶ 247-250 (adopting a safeguard that presumes a market distortion has occurred if the ratio of outbound (U.S.-billed) to inbound (foreign-billed) settled traffic increases 10 or more percent in two successive quarterly measuring periods).

116 MCI WorldCom comments at 5-6.

117 *See, e.g.*, NTTA.com comments at 5-8; GTE comments at 9 (suggesting that the Commission should create a presumption that the ISP does not apply unless necessary to overcome a very high risk to competition); *see also* Comptel comments at 7-8 (urging the Commission to conduct an inquiry within 12 months on whether the ISP is necessary on any WTO country routes).

118 GTE comments at 8.

119 Internet telephony is a promising means of bypassing the traditional settlements system. At present, however, such services remain cumbersome for the average user and account for a minimal amount of international voice traffic.

WTO Member markets, as GTE proposes, are outweighed by the risks.

64. Some commenting parties urge the Commission to allow U.S. carriers to exchange limited amounts of traffic outside of the ISP on all routes.[120] For instance, Sprint urges us to lift the ISP and all filing requirements for arrangements that affect less than 25 percent of the traffic on a route. Again, we find that lifting the ISP on all routes, even for arrangements affecting limited amounts of traffic, would expose U.S. carriers to significant risk with little corresponding benefit. Foreign markets where there are not equivalent resale opportunities and where settlement rates are above the benchmark pose a significant potential risk of one-way bypass and/or whipsawing by the dominant foreign carrier. Further, if agreements are not filed with the Commission, there would be no effective means to prevent a foreign carrier with market power from diverting substantial volumes of traffic through multiple arrangements with different U.S. carriers, each affecting amounts of traffic below the applicable threshold. We therefore do not adopt the proposals for removing the ISP from all routes for limited amounts of traffic.

65. We will amend our rules establishing procedures for carriers seeking to enter into an arrangement that does not comply with the ISP with a foreign carrier that possesses market power on a route for which the ISP has not previously been lifted. Such carriers must file a petition for declaratory ruling that at least 50 percent of U.S.-billed traffic on the route is terminated in the foreign market at rates that are 25 percent below the benchmark settlement rate, or less.[121] For upper income routes, 25 percent below the benchmark rate is 11.25 cents; for upper middle income routes, 25 percent below the benchmark rate is 14.25 cents; and for lower income routes, 25 percent below the benchmark rate is 17.25 cents. Carriers filing such petitions should include the appropriate supporting documentation demonstrating that the route qualifies for exemption from the ISP. Such documentation may include settlement rate or other data published by the Commission. The Commission will issue a public notice upon the filing of such a petition and may, in each case, determine an appropriate deadline for filing comments. Unopposed requests may be granted by public notice. We will publish and periodically update a list of international routes exempt from the ISP on our web page.

2. Filing Requirements

66. Section 43.51 of our rules currently requires that all U.S. carriers file, within 30 days of execution, a copy of certain arrangements entered into with a foreign carrier.[122] This requirement applies to all arrangements with foreign carriers for the exchange of traffic, regardless of whether such arrangements concern traffic settled in a traditional manner, pursuant to a flexible settlement arrangement, or under an ISR arrangement.[123] In addition, Section 64.1001 of our rules requires that carriers file with the Commission detailed information regarding changes in accounting rates entered

[120] *See, e.g.*, Level 3 comments at 3-4 (10%); Sprint comments at 5 (25%).

[121] The rate for terminating traffic includes all rates for terminating traffic, including settlement rates and ISR rates.

[122] 47 C.F.R. § 43.51. This requirement applies to all arrangements entered into with foreign carriers for the exchange of service, the interchange or routing of traffic, and matters concerning rates, accounting rates, division of tolls, or the basis of settlement of traffic balances. *Id.* § 43.51(a)(1)-(2).

[123] 47 C.F.R. § 43.51(a).

into with foreign carriers.[124]

67. In the *Notice*, the Commission sought comment on whether it should remove the Section 43.51 contract filing requirement and the Section 64.1001 accounting rate filing requirement for arrangements on routes where the Commission has removed the ISP. We noted that requiring public filing of contracts could preclude carriers from negotiating some arrangements that could be pro-competitive. We also noted, however, that a carrier with market power in the foreign market may have the ability to exercise market power, even on routes where we remove the ISP.[125] In section III.A.1, above, we remove the requirement that carriers file contracts and related information for arrangements with foreign carriers that lack market power. We conclude here that we should amend the Commission's filing requirements to allow that settlement rate information and copies of contracts required to be filed under Section 43.51 be filed confidentially for arrangements with foreign carriers that possess market power on routes where we remove the ISP.

68. Commenting parties express concern that confidential agreements with foreign carriers that possess market power in the foreign market can permit the foreign carrier to leverage its market power to the detriment of U.S. consumers and competition.[126] Other parties, however, argue that public disclosure of arrangements conducted outside of the ISP is not necessary and could stifle competition on routes that the Commission has approved for ISR.[127] Cable & Wireless states that rates currently disclosed for service provided on ISR routes are not indicative of actual prices carriers pay to terminate traffic in the foreign market and that disclosure of inaccurate information may actually harm competition.[128]

69. We find that requiring carriers to file copies of arrangements entered into with foreign carriers that possess market power in the relevant foreign telecommunications markets provides a valuable tool to ensure that U.S. carriers do not enter into arrangements that would allow the foreign carrier to exercise its market power to the detriment of U.S. consumers. We also find, however, that public disclosure of such contracts may have a chilling effect on pro-competitive termination arrangements because parties may be more reluctant to conclude arrangements that must be disclosed publicly.[129] Our goal in this proceeding is to balance these two competing concerns of promoting

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124 47 C.F.R. § 64.1001; *see also Regulation of International Settlement Rates*, CC Docket 90-337, Phase I, *Report and Order*, 6 FCC Rcd 3552 (1991).

125 *Notice*, 13 FCC Rcd at 15,332, ¶ 30.

126 *See*, e.g., MCI WorldCom comments at 8.

127 *See, e.g.*, C&W comments at 8-9; Qwest comments at 5-6.

128 C&W comments at 8-9.

129 *See* BTNA comments at 9 (filing requirements inhibit U.S. carriers from entering into innovative arrangements that would be procompetitive and could reduce rates for U.S. customers); *see also* Comptel comments at 10 (Comptel supports removing filing requirements "because the benefits to be gained from lifting the requirements overwhelmingly outnumber any theoretical justification for their retention").

competition, while precluding the abuse of foreign market power.[130] We find that these two goals can be accommodated by amending our filing requirements to allow confidential treatment of information for arrangements to which we no longer apply the ISP. We will therefore amend Section 43.51 and section 64.1001 of the Commission's rules to require carriers that exchange traffic with foreign carriers that possess market power on routes where we have lifted the ISP to file information on rates paid for the origination and/or termination of international traffic and copies of their contracts with these foreign carriers with the Commission. Such information may be filed with the Commission under confidential seal.[131] This filing requirement covers all arrangements between U.S. and foreign carriers that possess market power, including arrangements currently classified as ISR arrangements and alternative settlement arrangements.

70. We decline to adopt the proposal of MCI WorldCom that we require that U.S. carriers continue to file publicly arrangements with affiliated foreign carriers and non-equity joint venture partners where the affiliate or partner possess market power.[132] We find that a confidential filing requirement will adequately deter the kind of anticompetitive conduct in which affiliated carriers or joint venture partners could engage. We recognize, however, that the potential exists for a foreign carrier with market power to leverage its market power into the U.S. market through a U.S. affiliate. We thus adopt a safeguard below to address this issue.[133]

3. Competitive Safeguard for Affiliated Carriers

71. In the *Notice*, we sought comment on whether we should adopt additional safeguards to prevent a competitive distortion in the market for U.S. international services that could occur as a result of lifting the ISP. We also recognized, however, that any safeguards we adopt may, to the extent they are not necessary, preclude carriers from responding to market influences and concluding arrangements that may bring settlement rates closer to cost.[134]

72. We recognize that arrangements between U.S. carriers and affiliated carriers and joint venture partners that possess market power in the foreign market pose special competitive concerns. The Commission has adopted a set of foreign-affiliated dominant carrier safeguards that apply to carriers affiliated with foreign carriers that possess market power. Our dominant carrier safeguards also apply to joint ventures or other arrangements that present a substantial risk of anticompetitive

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[130] We note that our concerns regarding public disclosure of rates, terms and conditions are different in this context than in the retail context. In a recent item, we removed tariffs on domestic interexchange service completely. We also required, however, that carriers disclose their rates, terms and conditions in order to meet the needs of consumers. *See Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, Order on Further Reconsideration and Erratum, FCC 99-47 (rel. March 31, 1999).

[131] Under the rules adopted in this Order, carriers entering into arrangements with foreign carriers that possess market power on routes that are exempt from the ISP are required to file accounting rate information as specified in new Section 43.51(f). Such information should be filed with the Commission, as well as with the Chief, International Bureau. *See infra,* Appendix B.

[132] MCI WorldCom comments at 8.

[133] *See infra,* ¶ 71-72.

[134] *See Notice,* 13 FCC Rcd at 15,337, ¶ 42.

effects in the U.S. international services market.[135] Removing the ISP could exacerbate the concern about anticompetitive behavior by allowing a foreign carrier to adopt a strategy that would raise the costs of its U.S. affiliate's rivals and thus improve the position of the joint enterprise. Such a strategy could take the form of a foreign carrier with market power charging unaffiliated carriers significantly higher rates to terminate traffic in the foreign market. A foreign carrier could also route substantially all of its return traffic to its affiliate, thereby depriving the unaffiliated carriers of settlement credits they receive from terminating foreign-originated traffic and raising their costs to terminate traffic in the foreign market. We find, for the reasons discussed above, however, that on routes where we remove the ISP, the danger of harm from such action, generally, is significantly reduced.[136] Nevertheless, we find that there is heightened concern about anticompetitive arrangements between U.S. carriers and their affiliates and joint venture partners. We thus find it necessary to adopt an additional safeguard to deter such arrangements. We adopt a safeguard that prohibits U.S. carriers that are affiliated or non-equity joint venture partners with foreign carriers that possess market power in the foreign market from entering into arrangements that may present a significant adverse impact on competition on the international route.[137] If we find that carriers have entered into such arrangements, we reserve the right to take appropriate action to remedy the situation, including reimposing the ISP on the route.

C. Expanding the Current ISR Policy

73. We sought comment in the *Notice* on whether we should permit authorized carriers to provide service via ISR on more routes to encourage alternatives to the international accounting rate system, in order to put pressure on above-cost settlement rates. We noted that our current policy places significant limits on the routes on which carriers may route traffic via ISR, in order to prevent one-way inbound bypass.[138] Many commenting parties with affiliates that possess market power in foreign markets and other small carriers favor the proposal to permit ISR on more routes, either for all WTO countries or for limited amounts of traffic.[139] All large U.S. international carriers oppose an expansion of the routes on which we permit ISR. These carriers argue that the risk of one-way bypass is substantial on routes that fail to qualify under our current ISR rules. They state that there would be little pro-competitive benefit from removing the ISP on such routes because most lack a means of terminating international traffic other than through the incumbent international carrier.[140]

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[135] *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3969, ¶ 253; *see also Foreign Participation Order*, 12 FCC Rcd 23,987-24,030, ¶¶ 215-86. The dominant carrier safeguards applicable to foreign affiliated U.S. carriers include: a limited structural separation requirement and quarterly reporting requirements on traffic and revenue, provisioning and maintenance, and circuit status.

[136] *See supra* Section III.B.1.

[137] *Cf. 1998 Biennial Regulatory Review -- Review of International Common Carrier Regulations*, IB Docket No. 98-118, FCC 99-51, (rel. March 23, 1999), at ¶ 23 (delegating to the International Bureau the authority to further scrutinize a streamlined application where it presents "a significant potential impact on competition").

[138] *Notice*, 13 FCC Rcd at 15,334-35, ¶¶ 37-38.

[139] *See, e.g.*, C&W comments at 4; NTTA.com comments at 12; GTE comments at 13; PrimeTEC comments at 10; Star Telecom reply at 6; *see also* TRA comments at 8; ACTA reply at 7.

[140] AT&T comments at 28-33; MCI WorldCom comments at 9; Sprint comments at 10-11.

74. We agree with the commenting parties that argue that it is premature to expand the ISR standard to additional routes, even for limited amounts of traffic. We find that the other steps we take in this *Order* are likely to have a significant pro-competitive impact in the U.S. international services market. Removing the ISP for all arrangements with foreign carriers that lack market power in the foreign market is likely to have a significant pro-competitive impact on routes that we have not approved for ISR. On such routes, U.S. facilities-based carriers will be authorized to provide service outside the ISP in correspondence with foreign carriers that lack market power. In addition, we allow U.S. private line resellers to engage in ISR in correspondence with foreign carriers that lack market power.[141] Thus, the effect of loosening our ISR rules on routes that do not qualify for ISP relief would only be to increase the extent to which U.S. carriers could enter into arrangements with foreign carriers that possess market power. We find that where settlement rates are high, and/or where the foreign market does not provide equivalent opportunities for ISR, the risk of one-way inbound bypass is too great to authorize ISR with a carrier with market power in a foreign market, even for limited amounts of traffic. We thus decline to modify our standard for providing ISR.

IV. Alternative Settlement Arrangements

75. In 1996, the Commission adopted the *Flexibility Order*, which established a framework for permitting flexibility in our accounting rate policies where appropriate market and regulatory conditions exist.[142] Under the flexibility policy, the Commission maintains a presumption in favor of allowing flexible settlement arrangements with carriers in WTO Member markets that can be rebutted only by a showing that the foreign carrier that is a party to the flexible settlement arrangement does not face competition from multiple facilities-based carriers.[143] Even where the presumption is rebutted, the Commission could approve a flexible settlement arrangement where it finds the arrangement "promotes market-oriented pricing and competition, while precluding the abuse of market power by the foreign correspondent."[144] Under the flexibility policy, carriers must file with the Commission, subject to notice and comment procedures, a petition for declaratory ruling requesting authority to enter into a particular flexible arrangement with a foreign carrier. The flexibility policy also includes safeguards to guard against anticompetitive arrangements.[145]

76. In the *Notice*, we observed that, to the extent the ISP does not apply to arrangements with particular foreign carriers on particular routes, our flexibility policy would be irrelevant. We thus

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[141] *See infra* ¶¶ 105-109.

[142] *Flexibility Order*, 11 FCC Rcd 20,063.

[143] *See Foreign Participation Order*, 12 FCC Rcd at 24,024-30, ¶¶ 297-313. For arrangements between U.S. carriers and foreign carriers in non-WTO Member markets, the Commission applies the "effective competitive opportunities" (ECO) test. We note that the *Flexibility* policy was modified in the *Foreign Participation Order* to remove the ECO test for arrangements between U.S. carriers and foreign carriers in WTO Member markets. *Id.* at 24,026-30, ¶¶ 302-313.

[144] *Flexibility Order*, 11 FCC Rcd at 20,080, ¶ 40.

[145] The Commission adopted two safeguards in the *Flexibility Order*. First, flexible settlement arrangements that affect over 25 percent of the traffic on the route must be publicly disclosed and not contain unreasonably discriminatory terms and conditions. Second, arrangements between U.S. carriers and foreign affiliates and joint venture partners must be publicly disclosed. *Flexibility Order*, 11 FCC Rcd at 20,081-83, ¶¶ 44-51.

sought comment on whether any modifications to our flexibility policy were necessary in light of the exemptions to the ISP that we proposed in the *Notice*. We also put forth two proposals to modify our flexibility policy safeguards and filing requirements in the event we retained the flexibility policy.[146]

77. AT&T and MCI WorldCom both addressed the issue of whether we should maintain the flexibility policy. AT&T questions whether we should maintain the flexibility policy if we adopt the proposals in the *Notice*. It states that removal of the ISP for arrangements on certain routes and with certain foreign carriers, as the Commission proposed, would "largely achieve the flexibility originally sought in adopting the original *Flexibility Order* in 1996."[147] MCI WorldCom agrees that the "Flexibility Policy will be largely superseded if the Commission modifies its ISP rules," but nonetheless urges the Commission to retain the flexibility policy. It states that there may be unique, unforeseen circumstances for allowing a waiver of the ISP even though the standard for removing the ISP has not been met.[148]

78. We find that the changes we make in this *Order* to exempt from the ISP arrangements between U.S. and foreign carriers that lack market power, and between U.S. and all foreign carriers on routes that allow U.S. carriers to terminate at least 50 percent of their traffic at rates that are at least 25 percent below the applicable benchmark settlement rate largely supersede the policies adopted in the *Flexibility Order*. We therefore find that maintaining the flexibility policies and procedures would needlessly complicate our accounting rate policies. As more carriers enter the market for international services, it is increasingly important that the Commission's policy on the exchange of international traffic be easy to administer and understand.

79. The flexibility policy has been a valuable first step in reforming our international settlements policy. With the other actions we take in this *Order*, however, we go far beyond the incremental steps we took in the 1996 *Flexibility Order*. The flexibility policy allows for limited exceptions to the ISP and requires U.S. carriers to obtain advance approval from the Commission for arrangements that deviate from the ISP. The policies we adopt in this *Order*, on the other hand, exempt all arrangements from the ISP, except those with foreign carriers with market power in markets where U.S. carriers are unable to terminate at least 50 percent of their traffic at rates that are 25 percent below the benchmark or lower. The flexibility policy would thus be relevant, in WTO Member markets, for only a limited class of arrangements. We find that maintaining the flexibility policy's detailed and complex procedures and standards for exempting settlement arrangements from the ISP makes little sense in light of the limited application it would have upon adoption of the new rules we adopt in this *Order*.

80. We agree with MCI WorldCom, however, that there may be "unforeseen circumstances" in which it may be in the public interest to allow an arrangement with a foreign carrier with market power to deviate from the ISP, even though the standard for removing the ISP has not

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[146] *Notice*, 13 FCC Rcd at 15,334, ¶ 36. We proposed to limit the filing of commercial information on routes that qualify for flexible treatment by removing the requirement that carriers reveal the terms and conditions of arrangements that do not trigger the flexibility policy's safeguards. *Id.* ¶ 35. Second, we sought comment on whether we should remove the requirement that arrangements between affiliated carriers be made public where the foreign affiliate lacks market power in the relevant foreign markets. *Id.* ¶ 36.

[147] AT&T comments at 18.

[148] MCI WorldCom comments at 8.

been met. We will therefore entertain waivers of the ISP for individual settlement arrangements. Among the factors we will consider are whether granting such a waiver would promote the public interest in achieving cost-based rates for terminating international traffic, while precluding the abuse of foreign market power.[149]

81. Finally, because we abolish the flexibility policy, we decline to adopt any of the proposals in the *Notice* for modifying the filing requirements and safeguards applicable to flexible settlement arrangements. We also note that all settlement arrangements that we have in the past approved under our flexibility policy would either qualify for exemption from the ISP under our new rules or the route that the arrangement concerns would be eligible for ISR. Therefore, arrangements approved under our flexibility policy will remain in effect.

V. Competitive Safeguards

A. The No Special Concessions Rule

82. The "No Special Concessions" rule prohibits a U.S. international carrier from agreeing to accept special concessions from a foreign carrier that has sufficient market power in the destination market to affect competition adversely in the United States.[150] The Commission has found that special concessions granted to a particular U.S. carrier by a foreign carrier with market power pose an unacceptable risk of anticompetitive harm in the U.S. international services market.[151] Prior to adoption of the *Foreign Participation Order*, the Commission prohibited the acceptance of special concessions from all foreign carriers. In the *Foreign Participation Order*, the Commission modified the rule so that it applies only to U.S. carrier dealings with foreign carriers that possess market power in the foreign market.[152] The Commission reasoned that special concessions granted by a foreign carrier that does not possess market power can serve the public interest, for example, by allowing carriers to offer innovative services that reduce rates for U.S. consumers.[153]

83. In the *Notice*, we sought comment on the extent to which the No Special Concessions Rule should apply on routes where we remove the ISP.[154] We also sought comment in the *Notice* on two specific issues concerning the interplay of the No Special Concessions rule and the ISP.

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[149] The Commission has ample authority to waive its rules. *See, e.g., BellSouth v. FCC*, 162 F.3d 1215.

[150] The No Special Concessions rule prohibits a U.S. international carrier from agreeing to accept special concessions with respect to traffic or revenue flows directly or indirectly from any foreign carrier that possesses market power in the foreign market. *See Foreign Participation Order*, 12 FCC Rcd at 23,957-65, ¶¶ 156-170 (1997). A "special concession" is defined as "any arrangement that affects traffic or revenue flows to or from the United States that is offered exclusively by a foreign carrier or administration to a particular carrier and not also to similarly situated U.S. international carriers authorized to serve a particular route." *Id.; see also Foreign Carrier Entry Order*, 11 FCC Rcd 3873.

[151] *Foreign Carrier Entry Order*, 11 FCC Rcd at 3971-72, ¶¶ 256-259.

[152] *See Foreign Participation Order*, 12 FCC Rcd at 23,956-65, ¶¶ 150-170.

[153] *See id.*, 12 FCC Rcd at 23,957, ¶ 156.

[154] *Notice*, 13 FCC Rcd at 15,335-37, ¶¶ 39-43.

84. First, we sought comment on whether the No Special Concessions rule should apply to the terms and conditions under which traffic is settled, including the allocation of return traffic, on a route where we remove the ISP. We tentatively concluded that it should not. We noted that the No Special Concessions rule would still prohibit exclusive arrangements with carriers that possess market power regarding interconnection of international facilities, private line provisioning and maintenance, as well as quality of service on routes where we remove the ISP.[155] All parties commenting on the issue agreed with our tentative conclusion.[156]

85. We agree with the commenting parties and find that there is no valid reason to apply the No Special Concessions rule to the terms and conditions under which traffic is settled, including the allocation of return traffic, on a route where we remove the ISP. We agree that it makes no sense for the No Special Concessions rule to impose a nondiscrimination requirement for settlement arrangements on routes where we remove the ISP. The point of removing the ISP is to allow market forces to determine the types of arrangements into which carriers enter. We therefore will amend Section 63.14 of the Commission's rules to clarify that the No Special Concessions rule does not apply to the terms and conditions under which traffic is settled, including the allocation of return traffic, on routes where we remove the ISP. We discuss below application of the No Special Concessions rule to other matters on routes where we remove the ISP.

86. Second, we sought comment on whether the No Special Concessions rule should apply to interconnection of international facilities, private line provisioning and maintenance, and quality of service on routes where we remove the ISP.[157] Most parties that commented on the matter argued that, with respect to matters other than the terms and conditions under which traffic is settled, the No Special Concessions rule should continue to apply to arrangements with foreign carriers that possess market power in the foreign market, even where we no longer apply the ISP.[158] We agree with the commenting parties that there is still a risk of anticompetitive conduct for arrangements with foreign carriers that possess market power, even on routes where we remove the ISP. We disagree with the comments of SBC, which argues that continued application of the No Special Concessions rule on routes where we remove the ISP would be unnecessary and counter-productive.[159] Even on routes where we remove the ISP, foreign carriers may retain significant market power that could enable them to discriminate among U.S. carriers. As PrimeTEC notes, discrimination with respect to "interconnection terms, private line provisioning, quality of service and the like" can undermine competition significantly.[160] We find that removing the ISP will accord U.S. carriers adequate freedom to negotiate with foreign carriers for the exchange of international traffic. We therefore will maintain the No Special Concessions rule, as modified above, on all routes, regardless of whether the ISP applies.

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[155] *Notice*, 13 FCC Rcd at 15,336, ¶ 41.

[156] *See, e.g.*, Telia comments at 6; MCI WorldCom comments at 10; FT comments at 6; AT&T comments at 15.

[157] *Notice*, 13 FCC Rcd at 15,335-36, ¶ 40.

[158] *See, e.g.*, BTNA comments at 9-10; Ameritech comments at 7; MCI WorldCom comments at 10; GSA comments at 11.

[159] *See* SBC comments at 19-20.

[160] *See* PrimeTEC reply at 10.

87. SBC urges us to modify the manner in which we apply the No Special Concessions rule. The rule currently prohibits a carrier from accepting an exclusive arrangement from a foreign carrier that possesses market power in any of the relevant foreign markets identified by the Commission. The relevant markets generally include: international transport facilities or services, inter-city facilities or services, and local access facilities or services on the foreign end.[161] SBC argues that the No Special Concessions rule should apply only to exclusive arrangements "affecting facilities, services or functions in the particular market in which the carrier has market power." SBC states that limiting the No Special Concessions rule in this manner would "eliminate unnecessary and anticompetitive restrictions on U.S. carriers' ability to negotiate efficient arrangements for the exchange of international traffic with foreign carriers."[162]

88. We decline to adopt the change that SBC proposes because we find that it would be a significant change in our policies that was not raised in the *Notice* and that inadequate record support exists for such a change. SBC urges us to adopt a change that would significantly alter the manner in which the Commission applies the No Special Concessions rule. No party other than SBC addressed this issue in their comments and the issue was not raised in the *Notice.* We therefore find that this issue is beyond the scope of this proceeding. We therefore decline, at this time, to adopt SBC's proposal.

B. "Grooming" of International Traffic

89. In the *Notice,* we sought comment on whether removing the ISP and related filing requirements may allow carriers to enter into arrangements that may have anticompetitive effects. In particular, we noted that U.S. carriers have, in the past, expressed concern regarding whether their competitors may negotiate arrangements to accept "groomed" traffic, *i.e.* traffic that terminates in particular geographic regions. We sought comment on whether such arrangements present a potential for anticompetitive effects, particularly with respect to arrangements between incumbent local exchange carriers (ILECs) and foreign carriers with market power.[163]

90. Several parties oppose allowing ILECs to engage in grooming arrangements with foreign carriers that possess market power on routes where we remove the ISP.[164] They argue generally that grooming arrangements between U.S. carriers with market power in local exchange markets and carriers with market power in foreign markets can lead to anticompetitive effects. AT&T and MCI WorldCom make two specific arguments for prohibiting grooming arrangements between ILECs and foreign carriers with market power. They argue that above-cost access charges give ILECs the ability to "subsidize entry into the international market or raise other U.S. carriers' costs."[165] ILECs could achieve this end, according to AT&T, first by offering foreign carriers unfairly low rates

[161] *See Foreign Participation Order,* 12 FCC Rcd at 19,953, ¶ 145.

[162] SBC comments at 19-20.

[163] *Notice,* 13 FCC Rcd at 15,337, ¶ 43.

[164] *See, e.g.,* MCI WorldCom comments at 10, reply at 7-9; PrimeTEC comments at 9, reply at 11; Star Telecom reply at 5-6.

[165] AT&T comments at 33; MCI WorldCom reply at 8.

to terminate traffic in their region, subsidized by above-cost access charges.[166] Second, AT&T argues that ILECs could raise their rivals costs by "distorting the mix of traffic available to other carriers."[167] AT&T also argues that ILECs could raise rivals costs by offering foreign carriers lower rates to terminate U.S. inbound traffic, which would deprive established carriers of return traffic that U.S. carriers rely on to offset above-cost settlements payments on outbound traffic.[168]

91. We find that the danger of anticompetitive effects of grooming arrangements cited by AT&T and MCI WorldCom are unlikely. First, we find that it would be irrational for an ILEC to offer "a lower inbound rate than other carriers," because of its "lower cost for access," as AT&T argues.[169] AT&T's argument ignores the opportunity cost of access charge revenue the ILEC would forego if it carried traffic over its own international termination facilities, instead of receiving the traffic in its local network from an unaffiliated international carrier. If an ILEC agrees to transport and terminate groomed international traffic in its local exchange service area, the ILEC would carry traffic that otherwise would be handled by a competing international carrier. The ILEC's competitor, however, would have handed the traffic to the ILEC, and would have paid the ILEC an access charge for doing so. By terminating the groomed international traffic itself, therefore, the ILEC forfeits a payment it otherwise would have received from its competitor. Thus, the ILEC has an opportunity cost it must consider when determining the price it will charge a foreign carrier for terminating traffic in the ILEC's region. If it agrees to terminate traffic at a rate that fails to take into account the opportunity cost of lost access charge revenue, it would earn a lower profit than it would if it had let another international carrier terminate the traffic. If it is assumed that the ILECs seek to maximize their profits, then any pricing strategy for terminating international traffic that does not recover the access charge would not be a rational strategy. We thus conclude that allowing ILECs to accept "groomed" traffic does not provide them with the economic incentive to engage in the anticompetitive strategy described by AT&T and MCI WorldCom. We therefore find that a prohibition against ILECs accepting "groomed" international traffic is unnecessary.

92. AT&T and MCI's second argument also is unpersuasive. They argue that an ILEC would raise U.S. carriers' costs by terminating low-cost traffic in its local exchange service area at low rates, which would leave other U.S. international carriers with only high-cost traffic to terminate outside of the ILEC's region. We conclude that this scenario does not present a significant danger. So long as grooming arrangements are limited to routes where we remove the ISP, all carriers will have the freedom to negotiate rates with foreign carriers for the termination of U.S. inbound traffic on those routes. Thus, if the cost of terminating traffic in the U.S. market increases for some carriers because an ILEC negotiates an arrangement to terminate low-cost foreign traffic in its region, carriers left with only higher cost traffic to terminate outside of the ILEC's region may negotiate a termination rate which reflects such increased costs.

93. Finally, we reject AT&T's argument that, because ILECs will agree to terminate the traffic of foreign carriers at low rates on routes where we remove the ISP, grooming arrangements will harm other U.S. carriers by depriving them of settlement revenue used to offset the cost of outbound service. We find that this argument bears little relation to the grooming of international traffic by an ILEC because any carrier has an incentive to capture inbound traffic by offering low rates, except a

166 AT&T comments at 33-34.

167 AT&T comments at 33; MCI WorldCom reply at 8.

168 AT&T comments at 33.

169 AT&T comments at 33.

carrier that already receives return traffic subject to a bilaterally agreed settlement arrangement. We find above that allowing carriers freely to negotiate agreements for the exchange of international traffic on routes where we remove the ISP will lead to procompetitive benefits.[170] We therefore find that it is not in the public interest to adopt a broad prohibition on the geographic selection of inbound international traffic by incumbent LECs on routes where we remove the ISP.

94. Given our conclusion that grooming arrangements are not a cause for concern on routes where we have removed the ISP, we remove here the condition that the International Bureau has imposed on BOC international Section 214 certificates that requires these carriers to obtain prior Commission approval of grooming arrangements.[171]

VI. Accounting Rate Filings

95. Under the procedures set out in the Commission's rules, carriers must seek approval for changes in accounting rates. Carriers seeking such approval must file either a modification request or a notification.[172] The notification requirement applies to simple reductions in the applicable accounting rate. Such notifications must be filed prior to the effective date of the change in the accounting rate and go into effect one day after filing. The accounting rate modification filing procedures apply to all other changes in accounting rates (except flexibility filings), including retroactive changes in the applicable accounting rate. Modification filings are automatically granted 21 days after filing if the filing is unopposed and the International Bureau has not notified the applicant that approval of the modification may not serve the public interest. Where a filing is not automatically granted, approval is only granted by formal action of the International Bureau.

96. The Commission sought comment in the *Notice* on whether it should continue to afford carriers the option of filing either a notification or a modification notice for simple changes in accounting rates negotiated with foreign carriers.[173] We observed in the *Notice* that the existence of two procedures for accounting rate filings has caused confusion and that few filings are made under the notification procedure. For instance, in many cases carriers seek to use notification filing procedures for accounting rate arrangements that should be filed under modification procedures, causing increased staff workload and additional paperwork for filing parties. We thus noted that having two procedures for accounting rate filings has made our accounting rate filing policies more complicated than they need to be. We therefore tentatively concluded that we should remove the option of filing a notification and require that all accounting rate filings be governed under the existing procedures for accounting rate modifications.[174]

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[170] *See supra* Section III.B.

[171] *See, e.g., Bell Atlantic Communications, Inc. and NYNEX Long Distance Company*, Order, Authorization and Certificate, DA 97-285 (Int'l Bur. rel. Feb. 7, 1997) (requiring that "any agreements that BACI and NYNEX LD negotiate with foreign carriers to route U.S. in-bound switched traffic to their respective in-region service areas via their authorized international private lines are subject to our Section 43.51(d) filing requirements").

[172] 47 C.F.R § 64.1001 (1998).

[173] *Notice*, 13 FCC Rcd at 15,337-39, ¶¶ 44-49.

[174] *Id.* at 15,338, ¶ 46.

97. Few commenting parties addressed this issue. MCI WorldCom supported our proposal, and Sprint opposed it.[175] Sprint argues that it is useful to have the option of filing an accounting rate notification to allow accounting rate changes to go into effect on one day's notice. It argues further that the fact that our policy is confusing does not justify removing it. We find, contrary to Sprint's contention, that our desire to simplify a confusing regulatory construct does, indeed, justify removing the notification procedure. We find that adopting our tentative conclusion to maintain a single procedure for accounting rate changes will simplify our regulatory structure and avoid confusion for parties seeking to make the required filings with the Commission.

98. We also note that there will be little practical impact from our decision to maintain a single procedure for accounting rate changes, the modification procedure. As discussed above, few carriers have taken advantage of our notification procedures. In 1997, the Commission received seven notification filings and 808 modification filings. In addition, although accounting rate modification filings cannot go into effect until after a 21 day comment period, all modification filings may be drafted or negotiated to have retroactive effect. There is therefore little practical difference between the modification procedures, which entail a 21 day delay before the modification is effective, and the notification procedures, which entail only a one day delay.

99. We also sought comment on the extent to which we should continue to require that carriers making accounting rate filings serve every carrier that provides service on the international route with a copy of the filing. We noted that the number of international carriers is growing on many routes and sought comment on whether another approach is warranted. We also noted that we had been urged to require that accounting rate filings be placed on public notice, as is required for petitions seeking approval of flexible settlement arrangements. Further, we noted that the Commission has introduced an electronic filing mechanism for accounting rate filings, and that information contained in such filings would be available on the Commission's web site.[176]

100. The Commission's electronic filing system for accounting rate filings was introduced very recently.[177] We have had insufficient experience with the system to determine whether the information available on the Commission's web site will be an adequate substitute for the existing service requirement. We therefore decline to remove the existing service requirement at this time. We anticipate, however, that we may remove the service requirement in the near future, as the Commission implements the new electronic filing system. We will therefore eliminate the existing service requirement within 3 months of the release of this Order. We delegate to the Chief, International Bureau the authority to implement this change and direct the Bureau to issue a Public Notice at that time to make this change in our rules.

VII. Issues on Reconsideration

A. Petitions for Reconsideration in CC Docket 90-337

[175] Sprint comments at 13; MCI WorldCom comments at 11-12.

[176] *Notice*, 13 FCC Rcd at 15,338-40, ¶¶ 47-49.

[177] *International Bureau On-Line Reports and Electronic Filing Pilot Program*, Public Notice, Report No.: IBFS-99-0001, Feb. 10, 1999; (announcing a two month pilot program for electronic filing of accounting rate information).

101. In the *Notice*, we stated that we would address in this proceeding the petitions for reconsideration of the *Flexibility Order*.[178] The petitioners urged us to modify in various ways the competitive safeguards the Commission adopted in the *Flexibility Order*. We sought comment on the petitioner's proposals in light of the changes we proposed to the ISP. In light of our decision to abolish the flexibility policy, we decline to adopt any of the petitioner's proposals. We therefore deny the petitions for reconsideration of the *Flexibility Order*.

B. Petitions for Reconsideration in IB Docket 95-22

102. We also have pending two remaining issues on reconsideration of the *Foreign Carrier Entry Order*.[179] In that order, we adopted the requirement that U.S. facilities-based carriers obtain separate Section 214 authority and demonstrate that equivalency exists when such carriers seek to provide ISR over their *facilities-based* U.S. international private lines.[180] This action conformed the treatment of facilities-based private lines to that adopted for resold private lines used to provide switched, basic services via ISR. We adopted an exception to this general rule, however, to permit a carrier to use its U.S. facilities-based private lines to carry switched traffic without demonstrating equivalency where two conditions are met: (1) the private line is interconnected to the public switched network on one end only — either the U.S. end or the foreign end; and (2) the foreign correspondent with which the U.S. facilities-based carrier is interchanging switched traffic is not the owner of the underlying foreign private line half-circuit.[181] This general rule, and its exception, remain in effect, although we have since modified our standard for permitting ISR by both facilities-based carriers and private line resellers.[182]

103. WorldCom asks that we allow a carrier to interconnect its U.S. facilities-based private line with the public switched network at one end without demonstrating that our ISR standard is met, even if the foreign correspondent owns the foreign private line half-circuit, whenever the foreign

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[178] *Notice*, 13 FCC Rcd at 15,339-40, ¶¶ 50-51; AT&T Petition for Reconsideration in CC Docket 90-337; PB Comm Petition for Reconsideration in CC Docket 90-337; NYNEX Petition for Reconsideration in CC Docket 90-337; TMI Petition for Reconsideration in CC Docket 90-337.

[179] WorldCom, Inc. Petition for Reconsideration in IB Docket No. 95-22 [hereinafter WorldCom Petition]; BT North America Inc. Petition for Reconsideration in IB Docket No. 95-22 [hereinafter BTNA Petition]. We stated in the *Foreign Participation Order* that we would address these issues in the instant *Flexibility Order* reconsideration proceeding (CC Docket No. 90-337). *See Foreign Participation Order*, 12 FCC Rcd at 24,055, ¶ 383.

[180] *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3931-36, ¶¶ 153-164. *See also supra* ¶ 13. Our rule governing the provision of ISR by U.S. facilities-based carriers is currently codified at 47 C.F.R. § 63.18(e)(4). We recently reorganized our part 63 rules governing international common carriers and moved this portion of the rules to new Section 63.22(e)(2). *See 1998 Biennial Regulatory Review -- Review of International Common Carrier Regulations*, IB Docket No. 98-118, FCC 99-51, (rel. March 23, 1999). The rule changes become effective on May 19, 1999.

[181] *Foreign Carrier Entry Order*, 11 FCC Rcd at 3933-35 ¶¶ 157-161. *See also Foreign Participation Order*, 12 FCC Rcd at 24,054, ¶ 382.

[182] *See supra* ¶ 15.

correspondent is a "non-dominant U.S.-affiliated" carrier.[183] Our rule on one-end interconnection currently prohibits such an arrangement with any carrier that owns the foreign half-circuit, whether or not the foreign carrier has market power or is affiliated with a U.S. carrier. The policy we adopted, WorldCom argues, has the unintended result of preventing U.S. carriers or their affiliates from buying foreign half-circuits in order to provide one-end interconnection services.[184] Impsat supports WorldCom's proposal but would not limit it to U.S.-affiliated foreign carriers; it suggests that we allow a U.S. facilities-based carrier to interconnect its private line with the public switched network at one end, without demonstrating that our ISR standard is met, even if the foreign correspondent owns the foreign half-circuit, as long as that correspondent lacks market power.[185] AT&T opposes WorldCom's proposal, arguing that it would limit the Commission's protections against one-way bypass of the settlements process. Any facilities-based carrier in the foreign market, AT&T argues, should be encouraged to grant cost-based settlement rates and should not be granted greater opportunities to benefit from one-way settlements bypass than any other carrier.[186]

104. We have allowed U.S. facilities-based private line carriers to provide one-end interconnection service without demonstrating that our ISR standard is met in order to promote competitive entry in foreign markets and ultimately lower prices for U.S. consumers. Our intent, in limiting the carriers with whom U.S. carriers could exchange switched traffic, was to prevent incumbent foreign carriers from sending their switched traffic into the United States outside the settlements process. Such conduct would exacerbate the settlements deficit without promoting new entry into the foreign market. In an environment where foreign governments now are permitting new entrants to obtain ownership interests in international facilities, however, the standard we adopted for one-end interconnection service is not tailored to accomplish our goals. Indeed, as we have already concluded based on the entire record of this proceeding, there are significant public interest benefits to permitting U.S. facilities-based carriers to provide switched services, without limitation, outside the ISP in correspondence with foreign carriers that lack market power.[187] In light of this conclusion, the provision we adopted in the *Foreign Carrier Entry Order* permitting one-end interconnection by U.S. facilities-based carriers is superfluous. Removing the ISP for arrangements with carriers that lack market power allows U.S. facilities-based carriers to carry switched traffic over international circuits interconnected on one or both ends in correspondence with foreign carriers that lack market power. Our decision to lift the ISP for all U.S. carrier arrangements with foreign carriers that lack market power thus effectively subsumes our rule that permits one-end interconnection by U.S. facilities-based carriers.[188] We therefore eliminate that rule.

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[183] *See generally*, WorldCom Petition.

[184] Reply of WorldCom, Inc. (IB Docket No. 95-22) at 1-2.

[185] Impsat Comments (IB Docket No. 95-22) at 3.

[186] AT&T Opposition (IB Docket No. 95-22) at 5-6.

[187] We find no support in the record, moreover, for limiting this conclusion to U.S.-affiliated foreign carriers that lack market power in the foreign country.

[188] We are aware that the current rule on one-end interconnection could be construed to permit a U.S. facilities-based carrier to exchange switched traffic outside the ISP with a foreign carrier that leases the foreign private line half-circuit from the incumbent provider of international services but that has market power in the foreign country's local access market. Unless the U.S. international route is approved for

105. BTNA seeks reconsideration of our decision not to allow resellers on the U.S. end to offer one-end interconnection services.[189] Allowing resellers to offer the service, BTNA argues, would bolster our efforts to open foreign markets, and any harm to U.S. facilities-based carriers would be *de minimis* because those carriers would continue to earn revenue from provision of the private line half-circuit to the reseller and would be able to compete to provide the service themselves. BTNA also sees no reason to presume that all one-end interconnection traffic will flow inbound to the United States. AT&T responds that BTNA has not shown why its request would serve the public interest.[190] It contends that lost settlement revenues would not be sufficiently offset by revenues facilities-based carriers would receive from the provision of the underlying private line half-circuit.

106. We find merit to BTNA's argument that U.S. private line resellers should be accorded the same regulatory freedom as U.S. facilities-based carriers to exchange switched traffic in correspondence with foreign carriers that lack market power. We found in the *Foreign Carrier Entry Order* that allowing resellers to offer one-end interconnection services would allow resellers to gain at the direct expense of facilities-based carriers without creating any avenue for facilities-based carriers to recoup lost settlement revenues from return traffic.[191] We note, however, that our decision here to lift the ISP for U.S. carrier arrangements with foreign carriers that lack market power means that no U.S. facilities-based carrier is assured of any return traffic from such foreign carriers to offset the U.S. carrier's payments for terminating its U.S.-outbound traffic. Indeed, allowing private line resellers to engage in ISR in correspondence with non-dominant foreign carriers would create additional competition to U.S. facilities-based carriers, thereby exerting increased downward pressure on rates paid by U.S. consumers.

107. We also agree with BTNA that any harm to U.S. facilities-based carriers from lost settlement revenues they would otherwise receive for handling inbound traffic would be *de minimis*, because: private line resellers would be limited to corresponding with foreign carriers that lack market power; facilities-based carriers would earn revenues on the provision of the underlying U.S. private line half-circuits; and it is unlikely that U.S. private line resellers would have any undue advantage in negotiating with non-dominant foreign carriers for the termination of foreign-originated traffic. We see no reason, moreover, to expect that permitting private line resellers to compete for the termination of traffic originated by non-dominant foreign carriers will afford the foreign carriers any ability to

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ISR, this arrangement would not be permitted under the policy we adopt in this order of lifting the ISP for U.S. arrangements with foreign carriers that lack market power in each relevant market in the foreign destination country, including the local access market. We find it reasonable to prohibit such arrangements given our finding in this proceeding that a carrier with market power in the local access and transport market of a foreign country could well affect the market for termination of international services. *See supra* ¶ 88.

189 BTNA Petition at 2-4. In a later filing, BTNA appears to limit its request to routes where the reseller is not affiliated with a foreign carrier that has market power. BTNA Reply (IB Docket No. 95-22) at 4. Our response to this request would be the same.

190 AT&T Opposition (IB Docket No. 95-22) at 3-4.

191 *Foreign Carrier Entry Order*, 10 FCC Rcd at 3934, ¶ 158.

whipsaw U.S. facilities-based carriers.[192]

108. For the foregoing reasons, we modify our rules to permit U.S.-authorized private line resellers to interconnect their private lines to the public switched network, at one or both ends, for the provision of switched basic services, and thus, to engage in ISR in either of the following circumstances: (1) on any route where the resale carrier exchanges switched traffic with a foreign carrier that lacks market power; or (2) on any route for which the Commission has authorized the provision of ISR.[193] This rule supersedes the condition that appears in the Section 214 authorizations of private line resellers that limits their ability to resell interconnected private lines on routes for which we have authorized ISR.[194]

109. We also direct all U.S. private line carriers to amend their international private line tariffs to track the policy and rules we adopt in this order. In particular, we shall require that a carrier's tariff explicitly state our policy that the private line user may engage in resale of the international private line for the provision of a switched, basic telecommunications service upon authorization from the Commission under Section 214 of the Communications Act of 1934, as amended, and provided that the private line is used only (1) on a route where the resale carrier exchanges switched traffic with a foreign carrier that the Commission has determined lacks market power;[195] or (2) on any route for which the Commission has lifted the ISP. Carriers will be required to amend their international private line tariffs within ten days after the effective date of the rules adopted in this order.

VIII. Administrative Matters

A. Final Regulatory Flexibility Certification

110. The Regulatory Flexibility Act (RFA)[196] requires that a regulatory flexibility analysis be prepared for notice-and-comment rulemaking proceedings, unless the agency certifies that "the rule

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[192] We find above that foreign carriers that lack market power pose little or no danger of whipsawing U.S. carriers. *See supra* ¶ 22.

[193] *See* Appendix A, § 63.23 (d).

[194] For example, the "Actions Taken" Public Notice that serves as the international Section 214 certificate of applications granted under the streamlined procedures contained in Section 63.12 of the Commission's rules provides that: "the carriers may not -- and their tariffs must state that their customers may not -- connect their private lines to the public switched network at either the U.S. end or foreign end, or both, for the provision of international switched basic services, unless the Commission has authorized the provision of switched services over private lines to the particular country at the foreign end of the private line."

[195] As discussed *supra* ¶ 43, the Commission will maintain on its web page a Public Notice containing a list of foreign carriers that do not meet our presumption that they lack market power.

[196] The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

will not, if promulgated, have a significant economic impact on a substantial number of small entities."[197] The RFA generally defines "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[198] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[199] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[200]

111. In the *Notice* in this proceeding, we certified that the proposed rules "[would] not, if promulgated, have a significant economic impact on a substantial number of small entities."[201] No comments were received concerning this certification. The purposes of this proceeding are to eliminate some regulatory requirements and to simplify and clarify other existing rules. These rule changes will affect facilities-based international telecommunications carriers exclusively -- in particular, approximately 10 facilities-based international telecommunications carriers. Neither the Commission nor SBA has developed a small business definition specifically applicable to such international carriers; therefore, we will utilize the definition under the SBA rules for Communications Services, Not Elsewhere Classified (NEC).[202] Under this definition, a small business is one with $11.0 million or less in annual receipts.[203] Based on information filed with the Commission, the subject facilities-based international telecommunications carriers do not fall within the above definition of "small business" because they each have more than $11.0 million in annual receipts. The rule modifications at issue do not impose any additional compliance burden on persons dealing with the Commission, including small entities. Rather, this action removes filing requirements in scaling back application of the Commission's International Settlements policy. Accordingly, we certify, pursuant to the RFA, that the rules adopted herein will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of the *Report and Order and Order on Reconsideration*, including a copy of this final certification, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A). In addition, the *Report and Order and Order on Reconsideration* and this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the Federal Register. *See* 5 U.S.C. § 605(b).

197 5 U.S.C. § 605(b).

198 *Id.* § 601(6).

199 *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in Small Business Act, 15 U.S.C. § 632).

200 Small Business Act, 15 U.S.C. § 632.

201 *See Notice*, 13 FCC Rcd 15,339, ¶ 48.

202 13 CFR § 120.121, SIC code 4899. Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

203 *Id.*

B. Supplemental Final Regulatory Flexibility Analysis

112. As required by the Regulatory Flexibility Act (RFA),[204] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice* in IB Docket No. 95-22,[205] and a Final Regulatory Flexibility Analysis (FRFA) was incorporated into the *Report and Order* in that docket.[206] This present Supplemental Final Regulatory Flexibility Analysis (Supplemental FRFA) conforms to the RFA.[207]

113. *Need for, and Objectives of, the Present Action.* This action creates greater opportunities for U.S. international private line resellers to carry U.S. international traffic outside of the settlements process. It also harmonizes the treatment of private line resellers with that of facilities-based carriers.

114. *Summary of Significant Issues Raised by Reconsideration Petitions.* No petitions were received in direct response to the FRFA in the *Report and Order*, nor were small business issues raised.

115. *Description and Estimate of the Number of Small Entities to which the Rules Will Apply.* As noted in the associated Final Regulatory Flexibility Certification in IB Docket No. 98-148, *supra*, the RFA directs agencies to provide a Regulatory Flexibility Analysis in notice-and-comment rulemaking proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." Our action on reconsideration in IB Docket No. 95-22 will affect telecommunications resellers, including resellers that are small businesses; therefore, we incorporate this present Supplemental FRFA into our *Report and Order and Order on Reconsideration*.

116. In our reconsideration of the petitions in IB Docket No. 95-22, we modify our rules to allow U.S. international private line resellers to carry switched traffic over international private line circuits in correspondence with foreign carriers that lack market power. We expect that these changes will allow U.S. private line resellers, including small entities, to take advantage of new opportunities in the international telecommunications marketplace. As noted in the associated certification, *supra*, in instances where neither the Commission nor the SBA has developed a small business definition specifically applicable to the entities potentially affected by our action, we utilize the pertinent definition under the SBA rules.[208] Here, neither the Commission nor the SBA has developed a

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[204] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[205] *Notice*, 13 FCC Rcd at 15,340-41, ¶¶ 53-54.

[206] *Foreign Carrier Entry Order*, 11 FCC Rcd at 3995-96.

[207] *See* 5 U.S.C. § 604.

[208] Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate

definition of small entities specifically applicable to resellers. The closest applicable SBA definition for a reseller is a telephone communications company other than a radiotelephone (wireless) company.[209] Below, we describe available statistics for telecommunications entities generally, including resellers, then give more particular information on resellers.

117. The SBA has developed a small business definition for establishments engaged in providing "Telephone Communications, Except Radiotelephone" (wireless) to be such businesses having no more than 1,500 employees.[210] The U.S. Bureau of the Census reports that there were 2,321 such telephone companies in operation for at least one year at the end of 1992.[211] All but 26 of the 2,321 non-radiotelephone companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone companies that might qualify as small entities. We do not have data specifying the number of these carriers that are not independently owned and operated, and thus are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that fewer than 2,295 small telephone communications companies other than radiotelephone companies are small entities that may be affected by present action.

118. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the numbers of commercial wireless entities, appears to be data the Commission publishes annually in its *Telecommunications Industry Revenue* report, regarding the Telecommunications Relay Service (TRS).[212] According to TRS data, 339 reported that they were engaged in the resale of telephone service (including debit card providers).[213] We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of resellers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 339 small entity resellers that may be affected by the proposed rules, if adopted.

119. *Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered.* In our reconsideration of the petitions in IB Docket No. 95-22, we modify our rules to allow U.S. private line resellers to carry switched traffic over international private line circuits in correspondence with foreign carriers that lack market power. We expect that these changes will expand the ability of U.S. private line resellers, including small entities, to reap

to the activities of the agency and publishes such definition(s) in the Federal Register."

209 13 C.F.R. § 121.201, SIC code 4813. *See also* Executive Office of the President, Office of Management and Budget, *Standard Industrial Classification Manual* (1987).

210 *Id.*

211 *1992 Census* at Firm Size 1-123.

212 FCC, Telecommunications Industry Revenue: TRS Fund Worksheet Data, Figure 2 (Number of Carriers Paying Into the TRS Fund by Type of Carrier) (Nov. 1997).

213 *Id.* at Figure 2.

economic benefits by taking advantage of new opportunities in the international telecommunications marketplace.

120. *Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements*. As discussed above, in our reconsideration of the petitions in IB Docket No. 95-22, we modify our rules to allow U.S. private line resellers to carry switched traffic over international private line circuits in correspondence with foreign carriers that lack market power. Authorized private line resellers will be subject to no reporting, recordkeeping, or compliance requirements in order to carry switched traffic over international private line circuits in correspondence with foreign carriers that lack market power.

121. *Report to Congress*. The Commission will send a copy of the *Report and Order and Order on Reconsideration*, including this Supplemental FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of the *Report and Order and Order on Reconsideration*, including this Supplemental FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Report and Order and Order on Reconsideration* and Supplemental FRFA (or summaries thereof) will also be published in the Federal Register. *See* 5 U.S.C. § 604(b).

C. Paperwork Reduction Act of 1995 Analysis

122. This *Report and Order* contains either a new or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this order, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due 60 days from date of publication of this Order in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. Written comments must be submitted on the proposed and/or modified information collections on or before 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 1-C804, 12th Street S.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov. For additional information concerning the information collections contained in the *Report and Order* contact Judy Boley at 202-418-0214.

IX. Ordering Clauses

123. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 2, 4(i), 201, 203, 205, 214, 303(r), and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 201, 205, 214, 303(r), 309, the policies, rules, and requirements discussed herein ARE ADOPTED and Parts 43 and 63 of the Commission's rules, 47 C.F.R. Secs. 43, 63, ARE AMENDED as set forth in Appendix A.

124. IT IS FURTHER ORDERED that the petitions for reconsideration in CC Docket No. 90-337 ARE DENIED.

125. IT IS FURTHER ORDERED that the petitions for reconsideration in IB Docket No. 95-22 ARE GRANTED IN PART and DENIED IN PART, as discussed herein.

126. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this *Report and Order and Order on Reconsideration*, including the Final Regulatory Flexibility Certification and the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

127. IT IS FURTHER ORDERED that the policies, rules, and requirements established in this decision shall take effect thirty days after publication in the Federal Register or in accordance with the requirements of 5 U.S.C. § 801(a)(3) and 44 U.S.C. § 3507.

Federal Communications Commission

Magalie Roman Salas

Magalie Roman Salas
Secretary

Appendix A

Final Rules

Parts 0, 43, 63, and 64 of the Commission's Rules and Regulations (Chapter I of Title 47 of the Code of Federal Regulations) are amended as follows:

PART 0 — COMMISSION ORGANIZATION

1. The authority citation for part 0 continues to read as follows:

Authority: Secs. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155.

2. Section 0.457 is amended by adding paragraph (d)(1)(vi) to read as follows:

§ 0.457 Records not routinely available for public inspection.

*****

(d) ***

(1) ***

(vi) The rates, terms and conditions in any agreement between a U.S. carrier and a foreign carrier that govern the settlement of U.S. international traffic, including the method for allocating return traffic, if the U.S. international route is exempt from the international settlements policy under § 43.51(g) of this chapter.

PART 43 — REPORTS OF COMMUNICATION COMMON CARRIERS AND CERTAIN AFFILIATES

3. The authority citation for part 43 continues to read as follows:

Authority: 47 U.S.C. 154; Telecommunications Act of 1996, Pub. L. 104-104, secs. 402(b)(2)(B), (c), 110 Stat. 56 (1996) as amended unless otherwise noted. 47 U.S.C. 211, 219, 220 as amended.

4. Section 43.51 is amended by revising paragraphs (a), (b) and (e), and by adding paragraphs (f) and (g) and Note 1 to read as follows:

§ 43.51 Contracts and concessions.

(a) Any communications common carrier that: is engaged in domestic communications and has not been classified as nondominant pursuant to § 61.3 of this chapter or, except as provided in paragraphs (f)-(g) of this section, is engaged in foreign communications, and enters into a contract with another carrier, including an operating agreement with a communications entity in a foreign point for the provision of a common carrier service between the United States and that point; must file with the Commission, within thirty (30) days of execution, a copy of each contract, agreement, concession, license, authorization, operating agreement or other arrangement to which it is a party and amendments thereto with respect to the following:

(1) The exchange of services;

(2) Except as provided in paragraph (c) of this section, the interchange or routing of traffic and matters concerning rates, accounting rates, division of tolls, or the basis of settlement of traffic balances; and

(3) The rights granted to the carrier by any foreign government for the landing, connection, installation, or operation of cables, land lines, radio stations, offices, or for otherwise engaging in communication operations.

(b) *** The Commission may, at any time and upon reasonable request, require any communication common carrier not subject to the provisions of this section to submit the documents referenced in this section.

*****

(e) International settlements policy. (1) Except as provided in paragraph (g) of this section, if a carrier files an operating agreement (whether in the form of a contract, concession, license, etc.) referred to in paragraph (a) of this section to begin providing switched voice, telex, telegraph, or packet-switched service between the United States and a foreign point and the terms and conditions of such agreement relating to the exchange of services, interchange or routing of traffic and matters concerning rates, accounting rates, division of tolls, the allocation of return traffic, or the basis of settlement of traffic balances, are not identical to the equivalent terms and conditions in the operating agreement of another carrier providing the same or similar service between the United States and the same foreign point, the carrier must also file with the International Bureau a modification request under § 64.1001 of this chapter. Unless a carrier is providing switched voice, telex, telegraph, or packet-switched service between the United States and a foreign point pursuant to an operating agreement that is exempt from the international settlements policy under paragraph (g) of this section, the carrier shall not bargain for or agree to accept more than its proportionate share of return traffic.

(2) Except as provided in paragraph (g) of this section, if a carrier files an amendment to the operating agreement referred to in paragraph (a) of this section under which it already provides switched voice, telex, telegraph, or packet-switched service between the United States and a foreign point, and other carriers provide the same or similar service to the same foreign point, and the amendment relates to the exchange of services, interchange or routing of traffic and matters concerning rates, accounting rates, division of tolls, the allocation of return traffic, or the basis of settlement of traffic balances, the carrier must also file with the International Bureau a modification request under § 64.1001 of this chapter.

(f) Confidential treatment. (1) A carrier providing service on an international route that is exempt from the international settlements policy under paragraph (g)(2) of this section, but that is required by paragraph (a) or (b) of this section to file a contract covering that route with the Commission, may request confidential treatment under § 0.457 of this chapter for the rates, terms and conditions that govern the settlement of U.S. international traffic.

(2) Carriers requesting confidential treatment under this paragraph must include the information specified in § 64.1001(c) of this chapter. Such filings shall be made with the Commission, with a copy to the Chief, International Bureau. The transmittal letter accompanying the confidential filing shall clearly identify the filing as responsive to § 43.51(f).

(g) Exemption from the international settlements policy and contract filing requirements. (1) A carrier that enters into a contract, including an operating agreement, for the provision of a common carrier service between the United States and a foreign point with a carrier that lacks market power in that foreign market is not subject to the requirements of paragraphs (a)-(b) or (e) of this section.

(i) A foreign carrier lacks market power for purposes of paragraph (g)(1) of this section if it does not appear on the Commission's list of foreign carriers that do not qualify for the presumption that they lack market power in particular foreign points. The list of foreign carriers that do not qualify for the presumption that they lack market power in particular foreign points is available from the International Bureau's World Wide Web site at http://www.fcc.gov/ib.

(ii) The Commission will include on the list of foreign carriers that do not qualify for the presumption that they lack market power in particular foreign points any foreign carrier that has 50 percent or more market share in the international transport or local access markets of a foreign point. A party that seeks to remove such a carrier from the Commission's list bears the burden of submitting information to the Commission sufficient to demonstrate that the foreign carrier lacks 50 percent market share in the international transport and local access markets on the foreign end of the route or that it nevertheless lacks sufficient market power on the foreign end of the route to affect competition adversely in the U.S. market. A party that seeks to add a carrier to the Commission's list bears the burden of submitting information to the Commission sufficient to demonstrate that the foreign carrier has 50 percent or more market share in the international transport or local access markets on the foreign end of the route or that it nevertheless has sufficient market power to affect competition adversely in the U.S. market.

(2) A carrier that enters into a contract, including an operating agreement, with a carrier in a foreign point for the provision of a common carrier service between the United States and that point is not subject to the international settlements policy in paragraph (e) of this section if the foreign point appears on the Commission's list of international routes that the Commission has exempted from the international settlements policy. The list of exempt routes is available from the International Bureau's World Wide Web site at http://www.fcc.gov/ib.

(i) A party that seeks to add a foreign market to the list of markets that are exempt from the international settlements policy must show that U.S. carriers are able to terminate at least 50 percent of U.S.-billed traffic in the foreign market at rates that are at least 25 percent below the benchmark settlement rate adopted for that country in IB Docket No. 96-261.

(ii) A party that seeks to remove a foreign market from the list of markets that are exempt from the international settlements policy must show that U.S. carriers are unable to terminate at least 50 percent of U.S.-billed traffic in the foreign market at rates that are at least 25 percent below the benchmark settlement rate adopted for that country in IB Docket No. 96-261.

Note 1 to § 43.51: The Commission's benchmark settlement rates are available in International Settlement Rates, IB Docket No. 96-261, *Report and Order*, 12 FCC Rcd 19,806, 62 FR 45758

(August 29, 1997).

PART 63 — EXTENSION OF LINES AND DISCONTINUANCE, REDUCTION, OUTAGE AND IMPAIRMENT OF SERVICE BY COMMON CARRIERS; AND GRANTS OF RECOGNIZED PRIVATE OPERATING AGENCY STATUS

5. The authority citation for part 63 continues to read as follows:

Authority: 47 U.S.C. 151, 154(i), 154(j), 160, 161, 201-205, 218, 403, 533 unless otherwise noted.

6. Section 63.14 is amended to revise paragraphs (a) and (c), to delete paragraph (d), and to add Note 1 to read as follows:

§ 63.14 Prohibition on agreeing to accept special concessions.

(a) Any carrier authorized to provide international communications service under this part shall be prohibited, except as provided in paragraph (c) of this section, from agreeing to accept special concessions directly or indirectly from any foreign carrier with respect to any U.S. international route where the foreign carrier possesses sufficient market power on the foreign end of the route to affect competition adversely in the U.S. market and from agreeing to accept special concessions in the future.

(b) ***

(c) This section shall not apply to the rates, terms and conditions in an agreement between a U.S. carrier and a foreign carrier that govern the settlement of international traffic, including the method for allocating return traffic, if the international route is exempt from the international settlements policy under § 43.51(g)(2) of this chapter.

Note 1 to § 63.14: Carriers may rely on the Commission's list of foreign carriers that do not qualify for the presumption that they lack market power in particular foreign points for purposes of determining which foreign carriers are the subject of the prohibitions contained in this section. The Commission's list of foreign carriers that do not qualify for the presumption that they lack market power is available from the International Bureau's World Wide Web site at http://www.fcc.gov/ib.

7. Section 63.16 is amended by revising paragraph (a) to read as follows:

§ 63.16 Switched services over private lines.

(a) Except as provided in §§ 63.22 (e)(2) and 63.23(d)(2), a carrier may provide switched basic services over its authorized private lines if and only if the country at the foreign end of the private line appears on a Commission list of destinations to which the Commission has authorized the provision of switched services over private lines. The list of authorized destinations is available from the International Bureau's World Wide Web site at http://www.fcc.gov/ib.

*****

8. Section 63.22 is amended by revising paragraph (e) to read as follows:

§ 63.22 Facilities-based international common carriers.

*****

(e)(1) Except as provided in paragraph (e)(2) of this section, the carrier may provide switched basic services over its authorized facilities-based private lines if and only if the country at the foreign end of the private line appears on a Commission list of countries to which the Commission has authorized the provision of switched services over private lines. See § 63.16. If at any time the Commission removes the country from that list or finds that market distortion has occurred in the routing of traffic between the United States and that country, the carrier shall comply with enforcement actions taken by the Commission.

(2) The carrier may use its authorized facilities-based private lines to provide switched basic services in circumstances where the carrier is exchanging switched traffic with a foreign carrier that lacks market power in the country at the foreign end of the private line.

(3) A foreign carrier lacks market power for purposes of paragraph (e)(2) of this section if it does not appear on the Commission's list of foreign carriers that do not qualify for the presumption that they lack market power in particular foreign points. This list is available from the International Bureau's World Wide Web site at http://www.fcc.gov/ib.

*****

9. Section 63.23 is amended by revising paragraph (d) to read as follows:

§ 63.23 Resale-based international common carriers.

*****

(d)(1) Except as provided in paragraph (d)(2) of this section, the carrier may provide switched basic services over its authorized resold private lines if and only if the country at the foreign end of the private line appears on a Commission list of countries to which the Commission has authorized the provision of switched services over private lines. See § 63.16. If at any time the Commission removes the country from that list or finds that market distortion has occurred in the routing of traffic between the United States and that country, the carrier shall comply with enforcement actions taken by the Commission.

(2) The carrier may use its authorized resold private lines to provide switched basic services in circumstances where the carrier is exchanging switched traffic with a foreign carrier that lacks market power in the country at the foreign end of the private line.

(3) A foreign carrier lacks market power for purposes of paragraph (d)(2) of this section if it does not appear on the Commission's list of foreign carriers that do not qualify for the presumption that they lack market power in particular foreign points. This list is available from the International Bureau's World Wide Web site at http://www.fcc.gov/ib.

*****

PART 64 — MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

10. The authority citation for part 64 continues to read as follows:

Authority: 47 U.S.C. 160, 201, 218, 226, 228, 332 unless otherwise noted.

11. Section 64.1001 is amended by revising paragraphs (a) through (g) and by removing paragraphs (h) through (l) to read as follows:

§ 64.1001 International settlements policy and modification requests.

*****

(b) If the international settlement arrangement in the operating agreement or amendment referred to in § 43.51(e)(1) or (e)(2) of this chapter differs from the arrangement in effect in the operating agreement of another carrier providing service to or from the same foreign point, the carrier must file a modification request under this section unless the international route is exempt from the international settlements policy under § 43.51(g) of this chapter.

(c) A modification request must contain the following information:

(1) The applicable international service;

(2) The name of the foreign telecommunications administration;

(3) The present accounting rate (including any surcharges);

(4) The new accounting rate (including any surcharges);

(5) The effective date;

(6) The division of the accounting rate; and

(7) An explanation of the proposed modification(s) in the operating agreement with the foreign correspondent.

(d) A modification request must contain a notarized statement that the filing carrier:

(1) Has not bargained for, nor has knowledge of, exclusive availability of the new accounting rate;

(2) Has not bargained for, nor has any indication that it will receive, more than its proportionate share of return traffic; and

(3) Has informed the foreign administration that U.S. policy requires that competing U.S. carriers have access to accounting rates negotiated by the filing carrier with the foreign administration

on a nondiscriminatory basis.

(e) An operating agreement or amendment filed under a modification request cannot become effective until the modification request has been granted under paragraph (g) of this section.

(f) Carriers must serve a copy of the modification request on all carriers providing the same or similar service to the foreign administration identified in the filing on the same day a modification request is filed.

(g) All modification requests will be subject to a twenty-one (21) day pleading period for objections or comments, commencing the date after the request is filed. If the modification request is not complete when filed, the carrier will be notified that additional information is to be submitted, and a new 21 day pleading period will begin when the additional information is filed. The modification request will be deemed granted as of the twenty-second (22nd) day without any formal staff action being taken: provided

(1) No objections have been filed, and

(2) The International Bureau has not notified the carrier that grant of the modification request may not serve the public interest and that implementation of the proposed modification must await formal staff action on the modification request. If objections or comments are filed, the carrier requesting the modification request may file a response pursuant to § 1.45 of this chapter. Modification requests that are formally opposed must await formal action by the International Bureau before the proposed modification can be implemented.

12. Section 64.1002 is removed.

Section 64.1002 Alternative settlement arrangements.

[Removed]

Appendix B

Commenting Parties

Parties filing comments
AT&T
Ameritech
Bell Atlantic
BellSouth
BT North America
Cable & Wireless USA, Inc. (C&W)
Competitive Telecommunications Association (Comptel)
Deutsche Telekom AG and Deutsche Telekom, Inc. (DT)
France Telecom (FT)
GTE
General Services Administration (GSA)
Level 3
MCI-WorldCom
NTTA.com
PrimeTEC International.
Qwest
RSL Com USA
SBC
Sprint
Teleglobe
Telia North America
Telecommunications Resellers Association (TRA)
Telegroup
TMI Communications

Parties filing reply comments
America's Carriers Telecommunication Association (ACTA)
Ameritech
AT&T
Bell Atlantic
C&W
GSA
GTE
Kokusai Denshin Denwa Co. Ltd. (KDD)
MCI WorldCom
PrimeTEC International
RSL com
SBC
Star Telecommunications
Telia N.A.
Telefonica International S.A.